IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No.478 of 2006

M/s.Moti Decorators .. Appellant

versus

Municipal Corporation of Gr. Mumbai & Anr. .. Respondents

...

Mr.P.K. Dhakephalkar with Ms.Sunita Poddar, Mr.M.V. Holmagi for the appellant.

Mr.A.Y. Sakhare, Sr. Advocate with Mr.Malandkar for respondent no.1.

Mr.F.E.Devitre with Mr.J.P. Sen, Mr.Singh and Mr.D.J Kakalia for respondent no.2.

CORAM : D.G. KARNIK, J

DATED : 8th September 2006

P.C.:

1. Heard learned counsel for the parties.

2. This appeal is directed against the order dated 19th June 2006 passed by the learned Judge of

the City Civil Court, Mumbai refusing to extend the ex-parte order of ad-interim injunction obtained by the appellant.

3. The appellant filed a suit against the respondent no.1 on 13th June 2006 and after the court hours moved the evening Judge, ex-parte for an injunction. The Court issued an injunction restraining the respondents from disturbing the possession of the appellant till 26th June 2006. By an order dated 26th June 2006 the regular Court directed that the respondent no.2 be added as a party to the suit and extended the ad-interim relief till 29th June 2006. Parties were heard on 29th June 2006 regarding the extension of the ad-interim relief. By the impugned order, the learned Judge declined to extend the ex-parte order of ad-interim relief previously passed. That order is impugned in this appeal.

4. The learned Judge appears to have refused to extend the ad-interim relief principally for three reasons : i) The learned Judge held that the appellant had previously filed a suit, bearing Suit no.5901 of 1985, for similar reliefs and the said suit

was dismissed. The order of dismissal was confirmed by the High Court and also by the Hon'ble Supreme Court in SLP No.2537 of 2006. The fact of filing of the previous suit and the orders passed by the Court therein were suppressed by the appellant while obtaining the ex-parte order of injunction. ii) Since the appellant had obtained ex-parte order of injunction it was obligatory on him to comply with the provisions of Order 39 Rule 3 of the Code of Civil Procedure (for short C.P.C) which requires the plaintiff to deliver to the opposite side copy of the application for injunction together with copy of the affidavit in support of the application, copy of the plaint and the copies of the documents on which he relies. Learned Judge noted that the appellant had failed to comply with the provisions of Order 39 Rule 3 of C.P.C. (iii) The learned Judge also held against the appellant on merits. He held that appellant had not made out a prima facie case. The appellant was only a contractor (Mandap contractor) whose rights were determined long back in the year 1976. The appellant was not in possession of the suit property and therefore was not entitled to any relief.

5. Mr.Dhakephalkar, learned Senior Counsel

appearing of the appellant, challenged each and every ground held against the appellant by the trial Court. He submitted that the previous suit no.5901 of 1985 was not in respect of the suit property but related only to a structure constructed on the suit property. It was therefore not necessary to disclose anything about the previous suit and the appellant cannot be held to be guilty of suppression of material facts. He did not produce for my inspection, a copy of the plaint in Suit no.5901 of 1985. However, a copy of the judgement dated 21st September 2002 rendered therein by the City Civil Court, Mumbai was handed in by Mr.Sakhare, learned Senior Advocate, appearing for respondent no.1. Issue no.1 framed in the suit is as follows :-

> "Do the plaintiff (appellant herein) prove that they are sub-lessees in respect of the land admeasuring 1588.93 sq.meters?

In the previous suit the appellant had claimed that he was a sub-lessee of the suit land and had claimed an injunction against demolition of the structure constructed thereon. It appears from the judgement

that issue no.1 was deleted. However, the reasons for the deletion of the issue are not clear. It however appears that the suit premises in the previous suit also included the land which is the subject matter of the present suit. Issue no.2 in the previous suit was:

> Do the plaintiffs (appellant herein) prove that they have legal and valid rights in respect of the suit premises?

That issue was answered in the negative indicating that appellants case was rejected by the Court.

6. Assuming the argument of the learned counsel for the appellant that the suit related only to the structure constructed on the suit property admeasuring 1588.93 sq.m is correct, in my view it was obligatory for the appellant to have disclosed about the previous litigation. Because the appellant claimed that the structure was erected on the suit land in pursuance of a sub-lease/licence granted to it in respect of the suit property. Not only the

appellant failed to disclose about the previous litigation but made a positively false statement in paragraph no.9 of the plaint to the following effect.

> "The plaintiffs have not filed any suit or proceedings either in this Hon'ble Court or any other Court touching the subject matter of the suit."
> (underlining supplied)

The appellant thus categorically stated that no suit even touching the subject matter of the suit was ever filed in any court. This was clearly a false and misleading statement. Since the initial order for injunction was obtained ex-parte on the basis of misleading statements the injunction was liable to be vacated under proviso to Rule 4 of Order 39 of C.P.C.

7. No arguments were advanced by Mr.Dhakephalkar, learned counsel for the appellant, regarding the non compliance of the proviso to Order 39 Rule 3 of the Code of Civil Procedure.

8. On merits, I am of the prima facie view, that the appellant has not proved that he was in possession of the suit property. In paragraph no.1 of the plaint, the appellant has averred that premises admeasuring 2154.75 sq.m. were given on lease by the respondent no.2 to him on 28th February 1967 by a lease/agreement. The appellant did not produce on record a copy of the lease or agreement under which he claimed to have come in possession of the suit premises. No other document was also filed to prove that the appellant was in possession of the suit property. If the appellant claimed that he came in possession of the property under a lease/agreement, he ought to have filed on record a copy of the document under which he obtained possession of the suit property. He ought to have also produced other evidence to show that he was in possession of the suit property on the date of the suit especially when the case of the respondent no.2 is that the appellant was only a mandap contractor and was never in possession of the suit property. The agreement with the appellant was terminated long ago in the year 1976. The appellant appears to be squatting over the property. Initially he constructed some structure illegally and filed a suit

for protecting the said structure, against the responded no.1 who had issued a notice under section 351 of the Bombay (Mumbai) Municipal Corporation Act (for short "the BMC Act"). As stated earlier, that suit was dismissed and order of dismissal was confirmed upto the Supreme Court. He gave an undertaking to the Supreme Court to remove the structure which he did not remove and therefore contempt proceedings were initiated against him. By an order dated 1st September 20006, the Supreme Court accepted the unqualified apology and dropped the contempt proceedings. In the very order, the Supreme Court has directed that the present appeal before this Court should be disposed of on merits, uninfluenced by the observations made therein. Hence, I have heard this appeal on merits without in any way influenced by the observations made in the contempt proceedings.

9. Apart from the reasons given by the trial court for refusing to extend the injunction, in my view, there is one more reason for me not to interfere in the order. The respondent no.2 is the lessee of the respondent no.1 of the larger property admeasuring about 92,000 sq.yards. The respondent

no.2 is in possession of the leased property of which the suit property is a part. According to the appellant, initially 2154.75 sq.m of land was sub-leased to him by the respondent no.2 under a lease/agreement. He then claims that a portion of the property subleased to him was acquired for a road and he remained in possession of 1588.93 sq.m. which is the suit property. The suit property being a part of the larger property, it was obligatory on the plaintiff to give proper description thereof along with the boundaries. Order 7 Rule 3 of the C.P.C. requires that the plaint shall contain description of the suit property sufficient to identify it and in case the property can be identified by boundaries the plaint shall specify the boundaries. The description of the property given in the plaint is incomplete. Boundaries or even the dimensions (length and breadth) of the suit property are not mentioned in the plaint. It is not possible to identify the suit property from and out of the total property held by the defendant. In the circumstances, no injunction could have been granted in respect of such unidentifiable property.

10. For these reasons, appeal is dismissed

summarily.

11. Request made by the learned counsel for the appellant for continuation of the ad-interim relief is rejected.

D.G. KARNIK, J